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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

ASKIA K_ _IL SHABAZ, RESPONDENT

---

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF MICHIGAN

---

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Deputy Chief
Civil and Appeals

ANDREA L. SOLAK P25217
Principal Attorney, Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5794

## QUESTIONS PRESENTED

I.

IS THE FOURTH AMENDMENT IMPLICATED WHEN THE POLICE SIMPLY UNDERTAKE TO RUN AFTER AN INDIVIDUAL, WHO HAS RUN AT THE SIGHT OF THEM, WITHOUT ANY ACTUAL RESTRAINT ON THE FREEDOM OF MOVEMENT OF THAT INDIVIDUAL BY PHYSICAL FORCE OR SHOW OF AUTHORITY, SO THAT A WEAPON THROWN TO THE GROUND BY THE INDIVIDUAL CANNOT BE CONSIDERED ABANDONED ABSENT PROBABLE CAUSE OR REASONABLE SUSPICION TO UNDERTAKE THE PURSUIT?

II.

IF THE ANSWER TO QUESTION I IS THAT THE PURSUIT ITSELF, INDEPENDENT FROM THE SEIZURE, REQUIRES SOME LEVEL OF CAUSE, THEN DID THE FLIGHT OF THE RESPONDENT AFTER LEAVING A BUILDING AT WHICH NARCOTICS AND WEAPONS OFFENSE ARRESTS HAD BEEN MADE PREVIOUSLY, AND AFTER ATTEMPTING TO HIDE A PAPER BAG IN HIS VEST OR PANTS AFTER OBSERVATION OF THE UNMARKED POLICE CAR, CONSTITUTE REASONABLE SUSPICION FOR AN INVESTIGATIVE DETENTION?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

ASKIA KHALIL SHABAZ, RESPONDENT

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PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF MICHIGAN

---

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Deputy Chief, Civil and Appeals, and Andrea L. Solak, Principal Attorney, and pray that a writ of certiorari issue to review the judgment

of the Supreme Court of the State of Michigan entered in the above-entitled cause on December 4,1985.

## OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported and is appended as Appendix A. The Opinion of the Michigan Supreme Court is reported as __Mich__ (1985) and is appended as Appendix B.

## STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on August 12, 1983. The judgment of the Michigan Supreme Court was entered on December 4, 1985. The jurisdiction of this Court is invoked under 28 USC Sec 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United

States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

> shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

The defendant was charged with Carrying A Concealed Weapon and bound over for trial in the Recorder's Court for the City of Detroit. Police Officer Surma testified at an evidentiary hearing to being on an auto patrol with his partners in the area of Woodward and Clairmont in the City of Detroit. The officers were in plain clothes, driving an unmarked standard police detective vehicle. The intersection was an area of high narcotics, weapons and robbery arrests. The defendant was seen leaving an address of 60 Clairmont, an apartment building

known for problems, and at which the Officer had personally mad 5-6 CCW and 10 narcotic arrests. The defendant was walking eastbound on Clairmont and was approximately 50 feet from the westbound patrol car, when the defendant looked in their direction and began stuffing a brown paper bag into his vest or pants. The defendant walked to a point where he and the car would pass, and as the car began to slow down, he began to run. An officer got out of the car and pursued the defendant; however, at no time did he call out, or command the defendant to halt. The defendant ran into a storefront dooorway, turned and attempted to leave, but was restrained by the officer. The officer retrieved the bag which was thrown into the vestibule, examined the contents, finding a revolver, which is the subject of the charge against him.

## REASONS FOR GRANTING THE WRIT

The Michigan Supreme Court upheld a trial court dismissal of a possession of a concealed weapons charged finding that the totality of circumstances did not provide the particularized suspicion that criminal activity was afoot so as to justify the temporary detention of the defendant, thus violating the respondent's privacy rights under the Fourth Amendment. The Court adopted the three generic classes of police-citizen encounters proposed by Justice White in the plurality opinion in Florida v Royer, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983). The State argued that there was no Fourth Amendment infringement, characterizing the police-citizen encounter as an "investigatory pursuit", based on reasonable suspicion and "an assessment of the whole picture" from the

specialized viewpoint of the trained law enforcement officer. United States v Cortez, 449 US 411, 417; 101 S Ct 690; 66 L Ed 2d 621 (1981). The majority opinion undertook an analysis of the "first tier" under Royer finding the Respondent was not free to go on his way. The dissent found as a matter of law that the act of running after another is not a detention for investigation, thus the conduct did not constitute a stop nor violate Fourth Amendment privacy rights. It is submitted that the latter interpretation accords with this Court's definition of a seizure.[1]

> We adhere to the view that a person is 'seized' only when, by means of

---

[1]The Petitioner's position has remained constant. There is no Fourth Amendment violation. While the State argued that the "second" tier had not been violated, the Majority and the Dissent "passed" on the question of whether the "first" tier was violated. The issue is properly before this Court. Dewey v Des Moines, 173 US 193, 197-8 (1898).

> physical force or show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards.
>
> United States v Mendenhall, 446 US 544,553-4; 100 S Ct 1870; 64 L Ed 2d 497 (1980).

The instant facts demonstrate there was no infringemnt of a citizen's right to walk away, nor any restraint upon the liberty of a citizen who took his own evasive course of action upon sighting an unmarked car. If the Fourth Amendment is not implicated, the retrieval of the abandoned property is not a result of illegal police action, and is not subject to the poisonous tree analysis under Wong Sun v United States, 371 US 471; 83 S Ct 407; 9 L Ed2d 441 (1963).

If the pursuit itself, independent from the seizure, requires some level of cause, the unprecipitated flight of the Respondent after leaving a building at which narcotics and weapons offense arrests had been previously made, and after attempting to hide a paper bag in his vest or pants upon observation of an unmarked police car, constitutes reasonable suspicion from the specialized viewpoint of a trained law enforcement officer. Cortez, supra at 417; United States v Green, 670 F 2d 1148, 1152 (CA DC, 1981). Terry v Ohio, 392 US 1; 88 SCt 1868; 20 L Ed 2d (1968).

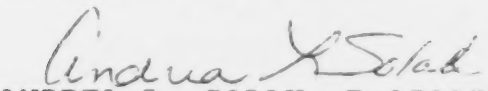
## CONCLUSION

It is respectfully submitted that for the reasons outlined above plenary review should be granted.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Deputy Chief
Civil and Appeals



ANDREA L. SOLAK P-25217
Principal Attorney, Appeals
12th Floor, 1441 St.Antoine
Detroit, Michigan 48226
Phone: (313) 224-5794

Dated: January 20, 1986
ALS/dh

# APPENDIX

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs- No. 68266

ASKIA KHALIL SHABAZ,

Defendant-Appellee.

BEFORE: D.F. Walsh, P.J.; Beasley and D.L. Sullivan,* JJ.

PER CURIAM

On September 3, 1982, defendant, Askia Khalil Shabaz, who was charged with carrying a concealed weapon, contrary to MCL 750.277; MSA 28.424, filed a motion to suppress the evidence and quash the information. After an evidentiary hearing held on October 8, 1982, the trial court granted defendant's motion. From this ruling, the prosecutor, pursuant to MCL 770.12(1)(c); MSA 28.1109(1)(c), appeals as of right.

* Circuit Judge, sitting on Court of Appeals by assignment.

The lone witness testifying at the evidentiary hearing was Kenneth Surma, one of the arresting officers. While patrolling the area of Woodward and Clairmont Avenues in Detroit with his partner during the evening of July 10, 1982, Surma and his partner, who were in plainclothes and an unmarked car, observed defendant leaving an apartment building located at 60 Clairmont Avenue. According to Surma, defendant looked in the direction of the unmarked car and placed a small paper bag under his vest.[1] When the officers reduced the speed of their car, defendant again looked in their direction and immediately started running on Clairmont toward Woodward Avenue. Surma alighted from the car and followed defendant, who ran to a building and dropped the paper bag on the doorway. As defendant came out of the doorway, Officer Surma and his partner

apprehended him. Officer Surma picked up the closed paper bag and, upon opening it, found a four inch blue steel revolver.

Officer Surma also testified that (1) neither he nor his partner had any information that defendant had committed or was preparing to commit a felony, (2) defendant did not have any visible weapon or contraband on his person, (3) he and his partner had not received a report that a felony had been committed in the area, and (4) at no time during their observation and pursuit of defendant did he or his partner identify themselves as police officers or ask defendant to halt.

In granting defendant's motion to suppress the revolver, the trial court, relying on People v Terrell,[2] held that the police officers did not have specific knowledge to justify an investigatory stop of defendant. The trial court

reasoned that since the initial intrusion was unlawful, the seizure of the closed paper bag containing the concealed weapon was impermissible.

On appeal, the prosecutor maintains that the trial court's holding that the facts and ircumstances did not justify an investigatory pursuit and stop of defendant was clearly erroneous. Essentially, the prosecutor asserts that the seizure of the weapon was permissible under two theories: (1) the investigatory pursuit and stop was proper because when defendant was first observed by the officers he placed a small paper bag under his vest, leading the officers to believe that defendant was attempting to hide an article and (2) defendant did not have standing to claim that the evidence was illegally seized, as he abandoned the bag in the doorway of the building.

The parties agree that the instant

situation is governed by the "stop and frisk" doctrine enunciated by the United States Supreme Court in Terry v Ohio[3] and Sibron v New York.[4] The Terry court articulated the rationale for permitting police officers to conduct investigatory stops:

> "One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest."[5]

When the police are engaged in activities of this nature, the Terry court cautioned:

> "Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.

> The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. *** And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."[6] (Citations and footnote omitted.)

The foregoing case was discussed by Professor LaFave in the following passage:

> "In the Terry case, the Chief Justice criticizes 'the distinctions of classical "stop-and-frisk" theory' on the ground that they serve to divert attention from the basic question of whether the officer's conduct was reasonable. The distinctions to which he referred, of course, are between a stopping on the street and a to-the-station arrest, and also between a frisk for weapons and the more extensive search that is commonly made incident to an arrest. Abjuring such labels, the Chief Justice concludes that they do not mark the boundaries of the fourth amendment; restraining a person on the street is certainly a 'seizure,' and an exploration of the outer surfaces of his clothing

is beyond question a 'search.' The Court therefore rejects 'the notions that the fourth amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'

"It is hard to see how anyone could quarrel with that conclusion. Indeed, it is somewhat surprising that the Court labors so hard to reach it, except for the fact that it assumed that 'classical "stop-and-frisk" theory' somehow supports a contrary position. This is not the case. Notwithstanding an occasional unfortunate choice of words in a few decisions, it has never been seriously contended that merely characterizing certain police activity as a 'stop' or a 'frisk' removes that conduct from the limitations of the fourth amendment. Rather, the traditional argument has been that the words 'stop' and 'frisk' are convenient ways of describing certain limited intrusions which, because of their scope, should be permitted in circumstances which would not justify the more serious intrusions of a to-the-station arrest accompanied by a search for weapons and evidence. The Supreme Court does not reject that argument, but embraces it.

"This is not to suggest, however, that the Court's failure to attach importance to the 'stop' and 'frisk' labels is not of major significance. As one commentator

> has correctly observed, a most important feature of these cases 'is that the Supreme Court of the United States has dissipated the notion that the search and seizure provisions of the Fourth Amendment are subject to verbal manipulation.' It is the reasonableness of the officer's conduct, not what the state chooses to call it, which is in issue. If courts adhere to this principle, that 'the importance of another verbalism--the term "arrest"--which for a long time has tended to dominate legal thinking in this area,' may wane."[7]

Our examination of the record convinces us that the trial court correctly held that insufficient facts and circumstances existed to provide the police officers with a reasonable belief that criminal activity may have been in progress. Like the factual setting in Terrell, supra, defendant's surreptitious gestures may have aroused the officers' general suspicions, but absent specific knowledge on the part of the officers, defendant's actions were insufficient to warrant an investigatory intrusion.[8] The officers' pursuit and stop of the

defendant was not justified at its inception, and thus, was an unlawful invasion of defendant's Fourth Amendment rights.

Of particular import to our holding are the following factors: (1) the officers were not investigating a recently committed crime in the area of Clairmont and Woodward Avenues; (2) defendant was unknown to the officers and was not the subject of an arrest warrant; (3) defendant did not resemble an individual suspected of committing a crime; (4) defendant did not have any contraband or weapons visibly on his person; (5) the officers were not in uniform and were travelling in an unmarked police car; and (6) during their pursuit of defendant, the officers did not identify themselves as policemen.

The instant matter is distinguishable from People v Carter,[9] a case primarily

relied upon by the prosecutor. In Carter, police officers encountered the defendant at nighttime in an area where several burglaries and rapes had occurred. Thereupon, the uniformed officers pursued defendant, culminating in the defendant throwing a plastic bag onto the ground. An officer lifted the bag and saw that it contained a brown substance which he believed was, and that turned out to be, heroin. A patdown search of defendant uncovered a loaded automatic pistol.

The factors justifying an investigatory pursuit and stop of the defendant in Carter are absent here: defendant Carter was seen in an area in which numerous crimes had been recently committed, the officers were travelling in a semi-marked patrol car, and the officers were in uniform, a fact which prompted the defendant to turn and run

toward a building which had been the scene of a recent burglary.

Based on our conclusion that the investigatory pursuit and stop of defendant was improper, the warrantless seizure of the brown paper bag was impermissible under the "plain view" exception. Since defendant's divestment of the bag containing the concealed weapon was contemporaneous with the illegal investigatory pursuit and stop, the evidence is inadmissible under the fruits of the poisonous tree doctrine enunciated in Wong Sun v United States.[10]

It is noteworthy that the prosecutor did not contend at the evidentiary hearing that defendant, as a result of abandoning the property, lacked standing to contest the seizure of the concealed weapon. Inasmuch as the issue was not raised in the trial court, it is not

preserved for appeal.[11] Nevertheless, we have considered the issue and hold that defendant's dropping of the package in the officers' presence does not purge the illegality of the unlawful investigatory pursuit and stop.[12]

The trial court's ruling on defendant's suppression motion was not clearly erroneous.

Affirmed.

(signed) Daniel F. Walsh
William R. Beasley
Daniel L. Sullivan

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[1] Officer Surma stated that defendant was wearing neither a suit jacket nor an outer coat.

[2] 77 Mich App 676; 259 NW2d 187 (1977).

[3] 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

[4] 392 US 40; 88 S Ct 1889; 20 L Ed 2d 917 (1968).

[5] Terry, supra, at 392 US 1, 22.

[6] Id. at p 27.

[7] LaFave, Street Encounters and the Constitution: Terry, Sibron, Peters and Beyond, 67 Mich L Rev 39, 51-52 (1968). See also, Anno: Stop and Frisk, 32 L Ed 2d 942 (1972).

[8] See also, People v Thomas, ___Colo___; ___P2d___; 33 Cr L Rep 2066 (1983), where the Colorado Supreme Court held that furtive gestures made by an individual which may appear to be an effort to avoid police contact do not warrant an investigatory stop or pursuit unless coupled with the officer's specific knowledge of criminal conduct.

[9] 96 Mich App 694; 293 NW2d 681 (1980), lv den 410 Mich 872 (1980).

[10] 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). For discussions of the "fruit of the poisonous tree doctrine", see Pitler, the Fruit of the Poisonous

Tree Revisited and Shepardized, 56 Cal L Rev 579 (1968); McCormick, Evidence (2d 3d), Sec 177, pp 411-416.

11 People v Dorrikas, 354 Mich 303, 316; 92 NW2d 305 (1958); 2 Gillespie, Michigan Criminal Law & Procedure (1978 Rev), Sec 786.2, pp 546-547; 1 Wigmore, Evidence (3d ed), Sec 18, pp 322-323.

12 In People v Kirchoff, 74 Mich App 641, 645-647; 254 NW2d 793 (1977), this court held that the defendant had abandoned a knapsack containing marijuana. However, the court also held that the initial investigatory stop was justified. Additionally, the defendant discarded the knapsack and continued in flight from the officers, where the within defendant was apprehended within a few feet of the paper bag.

NOTE: Where possible, a syllabus (headnote) such as this will be released at the time the opinion is released. This syllabus is not a part of the opinion of the Court but has been written by the Reporter of Decisions as a summary of the case for the convenience of readers. See United States v Detroit Lumber Co, 200 US 321, 337; 26 S Ct 282; 50 L Ed 499 (1906).

PEOPLE V SHABAZ

Docket No. 72567. Argued March 6, 1985 (Calendar No. 7). -- Decided December 4, 1985.

Askia K. Shabaz was charged with carrying a concealed weapon. The Detroit Recorder's Court, Michael F. Sapala, J., granted the defendant's motion to suppress evidence of the weapon and dismissed the case. The Court of Appeals, D.F. Walsh, P.J., and Beasley

and Sullivan, JJ., affirmed in an unpublished opinion per curiam (Docket No. 68266). The People appeal.

In an opinion by Justice Tyan, joined by Justices Levin, Brickley, Cavanagh, and Riley, the Supreme Court held:

Suppression of evidence of the weapon was proper. The seizure of the defendant was unreasonable and, but for the illegal seizure, the weapon would not have been discovered. The circumstances surrounding the seizure of the defendant as they appeared to the police officers at the time of the seizure, considered in their totality, did not provide the requisite particularized suspicion of criminal activity based on objective observation sufficient to outweigh the defendant's privacy interests under the Fourth Amendment.

1. The Fourth Amendment does not provide a guarantee against all searches

and seizures, but only against those that are unreasonable. The guarantee applies to all seizures of a person, including seizures involving only brief detention short of traditional arrest. A seizure of a person, to be valid, generally must involve probable cause to arrest. However, a valid investigatory stop may be made by the police with less than probable cause. Such a stop must be reasonable, i.e., it must be justified at its inception and must be reasonably related in scope to the circumstances which justified interference by the police with the person's personal security. Justification must be based on an objective manifestation that the person stopped was or was about to be engaged in criminal activity. The totality of the circumstances must be taken into account, and must show that the detaining officer had a particular-

ized and objective basis for the suspicion of criminal activity.

2. The approach of a person by the police in a public place to inquire whether the person is willing to answer questions, the actual questioning of the person, or the introduction in a criminal prosecution of the person's voluntary answers to such questions is not violative of the Fourth Amendment guarantee. Nor would an encounter with a properly identified officer, without more, amount to a seizure requiring some level of objective justification. The person approached, however, need not respond to the officer's questions or may decline to answer the questions, and may not be detained even momentarily without reasonable, objective grounds for doing so.

3. No full search of a person who is merely suspected of criminal activity or

the person's effects may be made without probable cause to arrest. Nor may the police seek to verify suspicions by means that approach the conditions of arrest. Probable cause to arrest requires facts and circumstances within an officer's knowledge that are sufficient to warrant a prudent person or one of reasonable caution to believe that the person suspected has committed, is committing, or is about to commit an offense. The fact that a person may seek to conceal the object of personal business, even in public, does not provide probable cause to arrest. The police may not conclude, merely because an object or a transaction is not openly displayed, that it is necessarily illegal.

4. In this case, the police did not properly identify themselves and approach the defendant for the purpose of questioning him. When he attempted to go on

his way, he was pursued and seized by the officers. At the time the officers saw the defendant and began to chase him, they did not have probable cause to arrest him. The facts that the defendant was observed at night in a high-crime neighborhood leaving a building in which the officers previously had made arrests for concealed-weapons violations and narcotics offenses and that, after looking in the direction of the officers' unmarked police vehicle, he attempted to conceal a paper bag under his vest afforded the officers no authority to confront the defendant or to require him to submit to an investigatory stop and interrogation because, on the basis of what they had observed, they had no articulable or particularized grounds to reasonably suspect that the defendant was, had been, or was about to be engaged in criminal activity. Nor did the

defendant's flight at the approach of the officers' unmarked police vehicle, by itself, support a reasonable suspicion. While the flight may have heightened the officers' general suspicion, it could not, alone, supply the particularized, reasoned, articulable basis to conclude that criminal activity was afoot so as to justify a temporary seizure.

5. The divestment by the defendant of a paper bag containing a revolver after being pursued by the police was not clearly abandonment. Whether or not abandonment was intended, it would not dissipate the taint flowing from the unreasonable conduct of the police. The pursuit of the defendant by the officers was an effective seizure. A seizure occurs when a reasonable person would believe that he is not free to leave.

Affirmed.

Justice Boyle, joined by Chief Justice

Williams, dissenting, stated that in this case there was no intrusion of protected interests sufficient to amount to a stop. While the reasonable belief of a person actually stopped by the police is relevant to whether a seizure has occurred, the threshold issue, whether a stop occurred, is one of law. On the record in this case, the pursuit of the defendant by the officers as a matter of law, was not a detention for investigation. Not even a forcible stop occurred before the defendant discarded the bag. Even if the pursuit was a stop, it is clear on the basis of the totality of the circumstances that the seizure was justified by a reasonable suspicion, founded on objective facts, that the defendant was involved in criminal activity. Because any seizure of the defendant was based on reasonable suspicion, the seizure of the bag was justified.

7/March 1985

STATE OF MICHIGAN

SUPREME COURT

Filed Dec 4 1985

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 72567

ASKIA KHALIL SHABAZ,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH

RYAN, J.

Defendant, Askia Khalil Shabaz,[1] was arrested for carrying a concealed weapon, a .357 caliber Smith and Wesson revolver, in violation of MCL 750.227; MSA 28.424. Following a preliminary examination held in the 36th District Court on July 22, 1982, he was bound over to the Recorder's Court for the City of Detroit for trial as charged. In October, 1982, an evidentiary hearing was held in the Recorder's Court upon the defendant's

motion to quash the information or, in the alternative, to suppress the revolver as evidence.[2] At the conclusion of the hearing, the court granted the motion to suppress the evidence, and dismissed the case. Upon the prosecutor's appeal, the Court of Appeals affirmed the trial court's ruling, in an unpublished opinion per curiam, finding that the trial court's action was not clearly erroneous. We granted leave to appeal, 418 Mich 950 (1984).

I

The facts available to us are taken from the preliminary examination and the evidentiary hearing, from the testimony of Officer Kenneth Surma, who was the only witness at both hearings.

On July 22, 1982, at approximately 9:00 p.m., Detroit Police Officers Surma, Scotsky, and Hayes were on patrol in an unmarked police vehicle in the area of

Clairmount and Woodward Avenues in the City of Detroit. The officers were in plain clothes, and Officer Scotsky was driving.

The vehicle was proceeding westbound on Clairmount from Woodward when Officer Surma observed defendant leaving a building at 60 Clairmount, which is on the north side of Clairmount and which comprises approximately thirty apartments.

Surma observed defendant carrying a small brown paper bag, and walking east on Clairmount toward Woodward Avenue. At the time he observed defendant leaving the building, Surma was in the police vehicle approximately fifty feet from the defendant, and the police car was moving toward defendant. Defendant looked in Surma's direction and began "stuffing a paper bag like under his vest," or "in his pants." The driver, Officer Scotsky,

slowed the vehicle, and the defendant and the scout car passed each other. When the officers' vehicle had nearly come to a complete stop, defendant "took off running." Surma testified: "We started slowing down to take a better look at what he was doing. As we were coming to a stop, he immediately started to run."

Officer Scotsky put the car in reverse and backed the vehicle to the corner of Woodward and Clairmount. When the car was approximately ten to fifteen feet from defendant, Surma got out of the car and chased the defendant south on Woodward while Officer Hayes "backed up" Surma. Surma chased defendant a distance of about three store fronts, and observed defendant enter a doorway at 9037 Woodward. During the chase, Surma did not observe anything in defendant's hands. By the time Surma reached the doorway the defendant had entered,

defendant was coming out. Surma grabbed defendant and, as the defendant tried to push away, Surma "tossed him towards Officer Hayes," and Hayes subdued the defendant. While chasing the defendant, Hayes had pulled his service revolver and, when defendant and Hayes collided, the firearm discharged, although no one was was struck. Surma then went into the vestibule of the building and retrieved a closed, brown paper bag. Surma did not know what was in the bag until after he retrieved it. The bag contained a "Smith & Wesson, four inch blue steel revolver, .357."

Officer Surma confiscated the weapon, unloaded it, and asked the defendant if he had a permit. After receiving a negative reply from the defendant, Surma placed defendant under arrest for unlawfully carrying a concealed weapon. During the chase, none of the officers

had identified themselves as police officers or given any order or command to the defendant.

Surma testified, at the preliminary examination, that he thought the defendant was "hiding something," and that "I believed it to be either weapon [sic] or narcotics," and that was the reason Officer Scotsky stopped the car. At the time Surma observed the defendant leave the apartment building on Clairmount, Surma did not have "any reports of a felony having been committed with the description of Mr. Shabaz," and Surma could not recall ever having seen the defendant before. When asked, "when you grabbed him, you didn't have any additional information or sighting that he had committed a felony or was about to commit a felony, had you?" Officer Surma replied, "No, I did not." Surma also acknowledged that there is a supermarket

very close to the apartment building and that people "normally bring things out of the supermarket in the same type of bag." In his eleven years on the police force, Officer Surma had made five to six arrests for concealed weapons offenses, and approximately ten narcotics arrests at the Clairmount address. Surma testified that, at the intersection of Clairmount and Woodward, one might expect to find narcotics, concealed weapons, and prostitutes, and that the police had problems with the building at 60 Clairmount in the past.

II

Following Officer Surma's testimony at the preliminary examination, the prosecutor moved the court to bind the defendant over to the Recorder's Court as charged. In opposition, defense counsel argued that "[t]here was no probable cause for the initial focus by the police

officers"; that defendant was near King Cole's grocery market; that any number of people in that apartment building would have paper bags; that there were any number of reasons "th[at] person would place the paper bag under his vest"; and that this is a "clear case of post hoc probable cause, rationalizing their subsequent actions after pursuing his person on a chimeral [sic] suspicion."

The prosecutor responded:

> "[N]ot everybody who has a paper bag tried [sic] to stuff it in their pants and tries to run away from people when they look at them. The officers did have a reasonable suspicion to at least stop the defendant at this point, and he continued to flee. Before he was even stopped, he discarded the bag. There's no search and seizure. It's just a situation that would justify a stop by a police officer and a pat down, which they didn't even get to that point. I don't believe that there's a search and seizure issue here, your Honor."

Defendant countered that the question is not one of search and seizure, but of probable cause for an arrest, and that

there was no probable cause for an arrest.

In binding the defendant over for trial, the district court simply stated, "The Court does find there's a question of fact and does bind the defendant over as charged, carrying a concealed weapon on a person."

At the evidentiary hearing in Recorder's Court, the prosecutor argued that Surma's actions were not unreasonable. He noted that the neighborhood in question was a high-crime area, that defendant was not coming out of a supermarket with a bag of groceries, and that an officer of eleven years "on the street knows pretty much whether--and as he indicated he thought either narcotics or a gun, from his experience and from the Court's, I think knowledge of Clairmount and Woodward would be a very reasonable assumption."

The defendant relied on his "brief and

memo" and did not offer argument. After observing that Officer Surma was a "totally credible witness," the court stated it was relying on People v Terrell, 77 Mich App 676; 259 NW2d 187 (1977),[3] and granted defendant's motion to suppress the evidence and dismissed the case.

The Court of Appeals, after first observing that "[t]he parties agree that this initial situation is governed by the 'stop and frisk' doctrine enunciated by the United States Supreme Court in Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968)," applied the Terry "stop and frisk" standard to the facts of this case and concluded:

> "Our examination of the record convinces us that the trial court correctly held that insufficient facts and circumstances existed to provide the police officers with a reasonable belief that criminal activity may have been in progress. Like the factual setting in Terrell, supra, defendant's surreptitious gestures may have aroused the officers' general

suspicions, but absent specific knowledge on the part of the officers, defendant's actions were insufficient to warrant an investigatory intrusion. The officers' pursuit and stop of the defendant was not justified at its inception and, thus, was an unlawful invasion of defendant's Fourth Amendment rights.

"Of particular import to our holding are the following factors:: (1) The officers were not investigating a recently committed crime in the area of Clairmount and Woodward Avenues; (2) defendant was unknown to the officers and was not the subject of an arrest warrant; (3) defendant did not resemble an individual suspected of committing a crime; (4) defendant did not have any contraband or weapons visibly on his person; (5) the officers were not in uniform and were travelling in an unmarked police car; and (6) during their pursuit of defendant, the officers did not identify themselves as policemen."

We granted leave to appeal, 418 Mich 950 (1984).

III

The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." US Const, Am IV. [4]

The Fourth Amendment is not a guarantee against all searches and seizures, but only against those that are unreasonable. United States v Sharpe, ____US____; 105 S Ct 1568; 84 L Ed 2d 605 (1985). The Fourth Amendment applies to all seizures of a person, including seizures that involve only a brief detention, short of traditional arrest. United States v Brignoni-Ponce, 422 US 873, 878; 95 S Ct 2574; 45 L Ed 2d 607 (1975); Davis v Mississippi, 394 US 721; 89 S Ct 1394; 22 L Ed 2d 676 (1969). Prior to Terry v Ohio, supra, any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause. Dunaway v New York, 442 US 200, 207-209; 99 S Ct 2248; 60 L Ed 2d 824 (1979). Terry created a limited exception to the probable cause requirement.

Given the parties' agreement that the lawfulness of the seizure of the revolver in question "is governed by the 'stop and frisk' doctrine enunciated...in Terry," we begin our analysis with a review of that case.

In Terry, a police officer observed the defendant, along with two other men, engaging in furtive behavior that the Supreme Court described as an "elaborately casual and oft-repeated reconnaissance of [a] store window" in downtown Cleveland which the arresting officer later characterized at trial as "casing a job, a stickup." The officer, a plainclothes detective of thirty-five-years experience, concluded that the three men were about to commit a robbery. The officer approached the three men, identified himself as a police officer, and asked for their names. After receiving a mumbled reply, the officer

conducted a pat-down search of the three men, obtaining two pistols, one from defendant Terry.

Terry's motion to suppress the evidence was denied, and the denial was affirmed by the Supreme Court of the United States. The Court found that the police conduct constituted a seizure within the meaning of the Fourth Amendment. "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." 392 US 16. The Court stated:

> "We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'" 392 US 19.

The constitutional inquiry under Terry is whether the seizure and subsequent search are reasonable.

> "We must decide whether at that point it was reasonable for [the

police officer] to have interfered with petitioner's personal security as he did. And in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one--whether the police officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified interference in the first place." 392 US 19-20.

The Court concluded that there was narrowly drawn authority to permit a search for weapons where the officer has reason to believe he is dealing with an armed and dangerous individual. The primary thrust of this exception is the basic government interest in protecting its police officers. The specific holding of Terry is narrow:

"We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel

> his reasonable fear for his own or others' safety, he is entitled to the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapon seized may be properly introduced in evidence against the person from whom they were taken." 392 US 30-31.

The Court, in Terry, specifically declined to deal with the question of an "investigative seizure upon less than probable cause for purposes of "'detention' and/or interrogation," 392 US 19, n 16, but, in subsequent cases, the Court has developed standards applicable to investigatory stops by police. This development if reviewed and summarized in United States v Cortez, 449 US 411, 417-418; 101 S Ct 690; 66 L Ed 2d 621 (1981):

> "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be engaged in criminal activity. Brown

v Texas 443 US 47, 51 [99 S Ct 2637; 61 L Ed 2d 357] (1979); Delaware v Prouse, 440 US 648, 661 [99 S Ct 1391; 59 L Ed 2d 660] (1979); United States v Brignoni-Ponce, [422 US 873, 884; 95 S Ct 2574; 45 L Ed 2d 607 (1975)]; Adams v Williams, 407 US 143, 146-149 [92 S Ct 1921; 32 L Ed 2d 612] (1972); Terry v Ohio, supra, at 16-19.

Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances--the whole picture--must be taken into account. Based upon that whole picture, the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. See, e.g., Brown v Texas, supra, at 51; United States v Brignoni-Ponce, supra, at 884.

"The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop in permissible. First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective

observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions--inferences and deductions that might well elude an untrained person.

"The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same--and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

"The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in Terry v Ohio, supra, said that '[t]his demand for specificity in the information upon which police action is predicated is the central teaching of the Court's Fourth Amendment jurisprudence.' Id. at 21, n 18. (Emphasis added.) See

also, Brown v Texas, supra, at 51; Delaware v Prouse, supra, at 661-663; United States v Brignoni-Ponce, supra at 884."

IV

In an apparent effort to bring some organization out of the kaleidoscope of Fourth Amendment search and seizure cases decided by the Supreme Court, particularly concerning various kinds of police-citizen encounters, Justice White, in a plurality opinion in Florida v Royer, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983), divided such encounters into three tiers. 5

The first tier consists of an officer asking a person questions in a public place.

> "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. See Dunaway v

New York, [442 US 200, 210, n 12; 99 S Ct 2248; 60 L Ed 2d 824] (1979); Terry v Ohio, 392 US at 31, 32-33 (Harlan, J., concurring), id., at 34 (White, J., concurring). Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. United States v Mendenhall, 446 US 544, 555 [100 S Ct 1870; 64 L Ed 2d 497] (1980) (opinion Stewart, J.). The person approached, however, need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way. Terry v Ohio, 392 US at 32-33 (Harlan, J., concurring), id., at 34; 20 L Ed 2d 889; 88 S Ct 1868; 44 Ohio Ops 2d 383 (White, J., concurring). He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. United States v Mendenhall, supra, 556 (opinion of Stewart, J.). If there is no detention--no seizure within the meaning of the Fourth Amendment -- then no constitutional rights have been infringed." 460 US 497-498.

The second tier of contact is the Terry stop described above. As a limited exception to the general rule that all restraints of the person must be

justified by probable cause, Terry provides that certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime.

> "Terry and its progeny, nevertheless, created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be 'investigative' yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest." 460 US 499 [6]

The third tier of contact is the arrest of a person based on probable cause.

> "This Court repeatedly has explained that 'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that

> the suspect has committed, is committing, or is about to commit an offense." Michigan v DeFillippo, 443 US 31, 37; 99 S Ct 2627; 61 L Ed 2d 343 (1979).

V

Plainly, the police encounter with defendant in this case was not at either the first or third tier of the Royer analysis. The officers did not approach Shabaz merely for the purpose of questioning him, after first identifying themselves as police officers, nor was the defendant free to "go on his way." Indeed, when he attempted to "go on his way," he was pursued and seized by the officers. And when the officers spotted the defendant and began to chase him, they did not have probable cause to arrest him. The prosecutor concedes as much, acknowledging in his brief and in oral argument, that the police-citizen encounter in this case was an "investigatory pursuit and stop," and

that its constitutionality is to be tested according to the standards announced in Terry. 7

We turn, therefore, to analyze the police encounter with Shabaz in this case according to the principles announced in Terry and the United States Supreme Court cases applying Terry. While factually there can by many justifications for a so-called "Terry stop," see footnote 6, the criteria for a constitutionally valid limited intrusion upon a citizen's liberty, short of probable cause for arrest, are that the police must have a particularized suspicion, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing. Brown v Texas, supra. As the Supreme Court stated in United States v Cortez, supra, the "articulable reasons" or "founded suspicion" or "particularized suspicion"

that criminal activity is afoot must derive from the police officer's assessment of the "whole picture" -- the totality of the circumstances with which he is confronted.

The "whole picture" with which the officers were confronted in this case, on the evening in question, can only be described by reference to individualized facts:

-- The defendant was observed on the street at the night in a high-crime neighborhood;

-- He was seen leaving an apartment building wherein the observing officers had previously made a number of arrests for concealed-weapons violations and narcotics offenses;

-- After looking in the direction of the unmarked police vehicle, the defendant was observed "stuffing a [small] paper bag like under his vest"

of "in his pants"; and

-- When the officers slowed their vehicles to a stop, defendant "took off running."

Whether all of the foregoing factors, considered in their totality, provided the officers with an articulable or particularized suspicion based on objective manifestations that Shabaz was involved in criminal wrongdoing can only be determined by evaluating the individual circumstances and determining whether collectively they are greater than the sum of their parts, and build to form the requisite objective basis for the particularized suspicion that criminal wrongdoing is afoot that would justify a Terry stop.

While the crime rate in a neighborhood may be a valid consideration to be taken into account when assessing reasonable suspicion, United States v Davis, 147 US

App DC 400, 403; 458 F2d 819 (1972), United States v White, 211 US App DC 72; 655 F2d 1302 (1982), that alone would not establish the grounds for an investigatory stop. Brown v Texas, supra. Defendant's presence in a high-crime neighborhood does nothing to distinguish him from any number of other pedestrians in the area. It provides no particular reasonable basis for suspicions to the activity of the defendant. The same must be said for his emergence from an apartment building known to the police to be the site of previous criminal activity. It cannot reasonably be concluded that everyone seen carrying a small paper bag, entering or leaving an apartment building where previous concealed weapons and narcotics arrests have been made, is likely to be involved in such activity. A high neighborhood crime rate ordinarily requires the

presence of both innocent victims and criminal perpetration in the same neighborhood.

Similarly, defendant's effort to conceal the paper bag in his vest, by itself, did not afford grounds for a stop. There was no evidence that the size or shape of the bag suggested that it contained a weapon. It may have contained money, liquor, food, jewelry, or any number of small items one might lawfully carry in a small bag and wish to conceal from view while walking down a darkened street in a high-crime area. It might, on the other hand, have contained unlawful contraband or an illegally concealed weapon. It is precisely because the officers could only speculate about the contents of the bag that they had no reasonable or articulable basis to conclude what its contents were.

> "[T]he sole fact that individuals may seek to conceal the object of

> their business from potentially prying eyes, even on the public sidewalk, does not grant the police the power to arrest them. While it is true that persons engaged in illegal transactions will desire to conceal those transactions, the desire for privacy in one's affairs is common among law-abiding persons as well. Thus, the police cannot conclude that merely because an object or a transaction is not openly displayed, it is necessarily illegal." United States v Green, 216 US App DC 329, 333; 670 F2d 1148 (1981).

Because the police could only guess about what defendant was seeking to hide, their speculation did not provide a particularized suspicion of possessory wrongdoing, but only a generalized one.

Considering the totality of the circumstances with which the police were confronted before the defendant began to run, it is clear that the officers were entirely without authority to confront the defendant and require him to submit to an investigatory stop and interrogation because, on the basis of what they had observed, the officers had

no articulable or particularized grounds to suspect, reasonably, that the defendant was, had been, or was about to be engaged in criminal activity. Nothing in their observation of him to that point provided the objectively reasonable and articulable suspicion that would justify the limited intrusion upon the defendant's liberty and privacy interests permitted under Terry.

What then was added to the picture when the defendant began to run that converted the naked and generalized suspicion of the police officers into articulable grounds to conclude that criminal activity was afoot?

Defendant's flight at the approach of police did not, by itself, in the circumstances of this case, support a reasonable suspicion. Although it is uncontroverted that flight may be a factor to be considered in ascertaining

whether there is reasonable suspicion to warrant a Terry stop, United States v Sharpe, supra; United States v Brignoni-Ponce, supra, flight alone is not a reliable indicator of guilt without other circumstances to make its import less ambiguous. United States v Green, supra, 215 US App DC 333; People v Tebedo, 81 Mich App 535; 265 NW2d 406 (1978).

Certainly it is reasonable to conclude that the defendant's flight away from the vehicle carrying the police officers might reasonably have heightened the officer's general suspicion that the defendant must have had something to hide and wished to avoid contact with the occupants of the vehicle. But heightened general suspicion occasioned by the flight of a surveillance subject does not alone supply the particularized, reasoned, articulable basis to conclude that criminal activity was afoot that is

required to justify the temporary seizure approved in Terry.

If it were otherwise, any citizen who refuses to answer a plain-clothes police officer's investigative questions during a "tier one" inquiry, and instead exercises his constitutional right to "go on his way"--at top speed--would, by the act of exercising his right to "move on," invite a full-blown tier two Terry "stop and frisk" not because of the addition of any articulable or particularized suspicion of imminent criminal activity, but because he exercised his right to the freedom of movement the Fourth Amendment guarantees.

That is what occurred here. The officers had no grounds to stop and frisk the defendant when they saw him walking on Clairmount Avenue. They then seized upon his "suspicious" act of running away from the unmarked car as providing the

articulable suspicion that criminal activity was underway. What criminal activity? What, in defendant's flight, when considered with the antecedent circumstances, provided a particularized suspicion that he was engaged in the commission of a crime?

It was clear to the officers in Terry that when Terry and his friends conducted an "elaborately casual and oft-repeated reconnaissance of the store window on Huron Road," by walking past it first in one direction then another and peering in the window, and "repeated this ritual alternately between five and six times," each time conferring with a third person stationed a short distance away, the suspects were "casing a job, a stick-up." That was the particularized and articulable suspicion of imminent criminal activity that justified the stop and frisk in Terry, and that the United

States Supreme Court declared to be a condition precedent to the constitutional validity of such limited intrusions.

If, as the United States Court of Appeals said in Green, supra, flight alone is not a reliable indicator of guilt without other circumstances because flight alone is inherently ambiguous, the ambiguity of the defendant's flight in this case is even more evident. The officers were not in uniform, they were driving an unmarked car, they did not identify themselves as police[8] and, upon first observing the defendant, they slowed their vehicle, fixed their attention on the defendant, and then pursued him. It is not unreasonable to expect that a citizen walking along the street in a high-crime area in the dark of night, who is being scrutinized and then "tailed" by three unknown persons in a "private" motor vehicle, would vacate the area at flank speed.

VI

Assessing collectively the individual factors with which the officers were confronted in dealing with the rapidly unfolding events on Clairmount Avenue, we are unable to conclude that they combined to create a totality of circumstances having any different constitutional quality or significance than did the constituent parts.

Each factor is capable of innocent interpretation, and we find the individual factors here do not build to form the requisite objective basis for the particularized suspicion required to justify a Terry stop. The police were not investigating a recently committed crime in the area which may have been linked to the defendant, nor was he known to the officers as a suspect in a crime. There was no contraband visible on defendant's person; the officers could only guess at the contents of the paper

bag. The defendant's flight from plain-clothes pursuers in an unmarked car was at most ambiguous, and at least understandable.

We conclude that the circumstances, as they appeared to the police officers on the night in question, considered in their totality, did not provide the requisite particularized suspicion based on objective observation that criminal activity was afoot sufficient to outweigh the defendant's privacy interests under the Fourth Amendment.

Because the seizure of the defendant was unreasonable, in not meeting the requirements of a Terry stop, any evidence derived from that seizure must be suppressed as fruit of the poisonous tree. Wong Sun v United States, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). We find that the weapon would not have been discovered, but for the illegal

seizure of the defendant, thus its admission into evidence was properly excluded by the courts below.

VII

The prosecutor claims that in throwing the paper bag containing the revolver to the floor in the vestibule of the building when he was seized, defendant abandoned the gun, thus cutting off his standing to claim that the evidence was illegally seized. [9] People v Kirchoff, 74 Mich App 641; 254 NW2d 793 (1977). We disagree. "Abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent." Friedman v United States, 347 F2d 697, 704 (CA 8, 1965). "The proof supporting abandonment should 'reasonably beget the exclusive inference of throwing away....'" People v Howard, 50 NY2d 583, 593; 408 NE2d 908; 430 NYS2d 578 (1980). Here, it is unclear from the evidence whether

defendant actually intended to throw away the bag or to continue to conceal it by hiding it in the building vestibule. Thus, we question whether an abandonment has occurred.

Regardless whether abandonment was intended, defendant's actions cannot be used to dissipate the taint flowing from the unreasonable police conduct. Where, as here, the police activity is coercive in nature, we find that it serves to nullify any claim of abandonment. Although defendant divested himself of the bag prior to the officer's actually taking physical hold of him, the pursuit itself by the officers was effectively the seizure of the defendant. A seizure occurs when a reasonable person would have believed that he was not free to leave. United States v Mendenhall, 446 US 544; 100 S Ct 1870; 64 L Ed 2d 497 (1980); Florida v Royer, supra; Terry v

Ohio, supra. As soon as the officers began their pursuit, defendant's freedom was restricted. If he stopped running, he would not be free to leave. Events proved that. Defendant's divestment of the bag was in direct response to his unjustified seizure. Following Wong Sun v United States, supra, the fruits of the officers' illegal action are not to be admitted as evidence unless an intervening independent act of free will purges the primary taint of the unlawful invasion. In light of the coercive effect of the seizure of the defendant, we find that his divestment of the paper bag, and the revolver it contained, does not constitute an independent act sufficient to purge the primary taint of the unlawful seizure.

The Recorder's Court properly suppressed the weapon as evidence.

Affirmed.

(signed) James L. Ryan
Michael F. Cavanagh
Dorothy Comstock Riley
James H. Brickley
Charles L. Levin

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[1] Defendants last name has been spelled "Shabaz" for most of the proceedings heretofore. However, defendant, in filling out the affidavit of indigency supporting petition for counsel for appellate review, spelled his name "Shabazz."

[2] The hearing judge characterized the proceeding as "an Evidentiary Hearing to determine the legality of the seizure and/or search of an item of evidence."

[3] In Terrell a police officer in a moving police vehicle observed the defendant standing on a street corner, talking to another person. When defendant looked in the direction of the police vehicle, he put his hand in his

pocket and began to run toward a nearby apartment building. The officer gave chase on foot because he believed "there could possibly be a gun in Mr. Terrell's pocket...." Id at 678. According to the officer, the defendant, on reaching the apartment building, removed a coin envelope from his pocket and dropped it on the floor. The officer retrieved the envelope, determined that it contained suspected heroin, and arrested the defendant for possession of narcotics.

The Court of Appeals affirmed the trial court's order suppressing the evidence as having been obtained in violation of the defendant's right under the Fourth Amendment of the United States Constitution, because "[a] totality of facts and circumstances which could provide the officer with a reasonable belief that criminal activity may be afoot was simply lacking." The Court of

Appeals added:

> "Defendant's furtive gestures may have aroused the police officer's general suspicions, but without some additional specific knowledge on the part of the officer they were insufficient to justify an intrusion." Id. at 680.

[4] Michigan's analogous provision, Const 1963, art 1, Sec. 11, reads:

> "The person, houses, papers, and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or thing shall issue without describing them, nor without probable cause, supported by oath or affirmation."

[5] Although Justice White's opinion was not adopted by a majority of the Court, we find this part of his opinion to be a correct and helpful analysis and summary of prior United States Supreme Court Fourth Amendment rulings.

[6] The essential underpinnings of the Terry decision--the police officers' reasonable suspicion that he may be dealing with a "armed and dangerous" person; that "nothing in the initial

stages of [his main] encounter serves to dispel his reasonable fear for his own or others' safety"; and that he is entitled to "conduct a carefully limited search ... in an attempt to discover weapons" -- have eroded with time and are no longer conditions precedent to justify a Terry stop. Subsequent Supreme Court decisions have ignored the "search for dangerous weapons" requirement of Terry and now permit the same kind of limited intrusions upon a citizen's liberty interests under what are called "special law enforcement needs." See United States v Sharpe, supra. In addition to the need to disarm an "armed and dangerous person to assure the safety of the police officers and others," Terry, supra; Adams v Williams, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972), "Terry stops" have been approved in order to conduct border searches for illegal aliens, United

States v Cortez, supra; United States v Brignoni-Ponce, supra; to conduct airport searches for suspected drug trafficking, Royer, supra; United States v Place, 462 US 696; 103 S Ct 2637; 77 L Ed 2d 110 (1983); United States v Mendenhall, supra; stops to investigate past felonies, United States v Hensley, ___US___; 105 S Ct 675; 83 L Ed 2d 604 (1985), and transportation of large quantities of drugs, United States v Sharpe, supra.

[7] At oral argument, the assistant prosecuting attorney stated that, as the Court of Appeals stated in this case, the parties are in agreement that an investigatory pursuit is governed by the principles of Terry v Ohio, and the comparable Michigan authority.

[8] Following Wong Sun v United States, 371 US 471, 482; 83 S Ct 407; 9 L Ed 2d 441 (1963), where the officers fail to

identify themselves, the suspect's flight must be regarded as ambiguous conduct.

[9] Although the assistant prosecutor conceded at oral argument that if the seizure were found to be unreasonable defendant could not be charged with the contents of the bag, she has argued the issue on abandonment in her brief. Therefore, we address it here.

7/March 1985

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 72567

ASKIA KAHIL [sic] SHABAZ,

Defendant-Appellee.

BOYLE, J. (dissenting).

This case presents two issues. The first issue is whether the initial contact between the police and the citizen in this case constituted a

"seizure" within the ambit of the protections afforded by the Fourth Amendment of the United States Constitution, against such activity. [1] The second issue is whether the officers conduct was reasonable, assuming the applicability of the Fourth Amendment, Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1986), when judged by the totality of circumstances at the time of the incident, United States v Cortez, 449 US 411; 101 S Ct 690; 66 L Ed 2d 621 (1981).

The first issue has not yet been authoritatively resolved by any decision of this Court or of the United States Supreme Court. It was foreshadowed almost twenty years ago by Justice Harlan's concurrence in Terry, supra. Writing separately, "to fill in a few gaps, as I see them, in (the majority) opinion" at 31-32, Justice Harlan stated:

"In the first place, if the frisk

> is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection he must first have a right not to avoid him but to be in his presence."

Despite Justice Harlan's prescient observation, the opinions in Terry and the companion cases focused[2] attention on the pat down of Mr. Terry, and the pocket searches of the defendants in the companion cases. As Professor LaFave has noted:

> "The failure of the majority to heed [Justice Harlan's] advice, it would seem, was unwise, for the Court thereby detoured around the threshold issue about stop and frisk, one on which courts, lawyers and police deserve guidance." LaFave, Search and Seizure, Sec. 9.3, p 64.

Research has disclosed only two United States Supreme Court cases[3] providing guidance for resolution of whether the

conduct here constituted a stop.

In United States v Mendenhall, 446 US 544; 100 S Ct 1870; 64 L Ed 2d 497 (1980), the Court considered whether a "seizure" had taken place when agents approached the defendant in an airport concourse and asked questions of her. In concluding that it had not, two justices noted that the Court in Terry had apparently and correctly assumed that a seizure had not taken place before the officer physically restrained Terry for purposes of searching his person for weapons. Mendenhall, supra at 552-553. The Justices stated:

> "We adhere to the view that a person is seized only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." Id at 553.

Analyzing the facts, Justices Stewart and Rehnquist observed that the events took place in a public concourse, the

agents wore no uniforms and displayed no weapons, they did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. "Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest."[4] Id. at 555.

In Immigration and Naturalization Service v Delgado, ____US____; 104 S Ct 1758; 80 L Ed 2d 247 (1984), an action for injunctive and declaratory relief was brought by employees and their union, seeking to prevent the Immigration and Naturalization Service from conducting "factory surveys" of the work force at a garment factory. Applying Mendenhall, supra, the Court of Appeals for the Ninth Circuit held that the stationing of agents at the doors to the buildings during the one to three hours that other agents approached workers and asked questions about employee citizenship

constituted a seizure of the entire work force because "a reasonable worker 'would have believed that he was not free to leave,'" Int'l Ladies' Garment Workers Union v Sureck, 681 F2d 624, 634 (CA 9, 1982). Consequently the Court of Appeals held that individual questioning of the employees violated the Fourth Amendment because there had been no reasonable suspicion or probable cause as to any of them.

In reversing the Court of Appeals, the majority held that interrogation relating to one' identity or a request for identification does not by itself constitute a Fourth Amendment seizure, despite the claim that the manner in which the surveys were conducted created a psychological environment which made the employees reasonable afraid they were not free to leave.

Justices Brennan and Marshall, concur-

ring in part and dissenting in part, believed that the employees were seized within the meaning of the Fourth Amendment when they were "accosted by the INS agents and questioned" by them in circumstances which "demonstrated a 'show of authority'...[that would] overbear the will of any reasonable person."[5]

While neither Mendenhall nor Delgado dispose of the issue presented here, they do illustrate that the Court has applied the test of a reasonable apprehension of a citizen not to be free to go, only to determine whether an actual confrontation between a citizen and the police for interrogation purposes has become a seizure requiring further justification. See also Brown v Texas, 443 US 47; 99 S Ct 2637; 61 L Ed 2d 357 (1979).

I would conclude that on this record there was not an intrusion on protected interests sufficient to constitute a

stop. While the reasonable belief of an individual actually stopped by the police is relevant to whether a seizure has occurred, the threshold issue, whether there has been a "stop," is one of law. I would find on this record that one individual running after another is, as a matter of law, not a detention for investigation. The defendant's flight prevented any request for an explanation of his behavior. On these facts, not even a "forcible stop," Terry, supra (Harlan, J., concurring), triggering Fourth Amendment protection had occurred before the defendant discarded the bag.

II

Even if running after the defendant was a "stop", it is clear that the seizure was justified by a reasonable suspicion, based on objective facts, that the defendant was involved in criminal activity.

Since Terry v Ohio, supra, the Court has determined the propriety of Terry-type activity by balancing the extent of the intrusion on the individual's rights against the right of the public to be free from criminal activity. Terry v Ohio, supra; Adams v Williams, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972), supra; United States v Brignoni-Ponce, 422 US 873; 95 S CT 2574; 45 L Ed 2d 607 (1975).

In his Mendenhall concurrence, Justice Powell, joined by Chief Justice Burger and Justice Blackmun, determined that the initial stop of the defendant was a stop protected by the Fourth Amendment, but that the stop was reasonable. Mendenhall, supra, at 560-566. Justice Powell wrote that, "[t]he jurisprudence of the Fourth Amendment demands consideration of the public's interest in effective law enforcement as well as each person's

constitutionally secured right to be free from unreasonable searches and seizures." Id. p 565. After balancing the public interest against the extent of the intrusion, in light of all the circumstances of the case, Justice Powell concluded that the stop was reasonable.

There can be no debate that unlawful use of handguns constitute a serious threat to public safety. According to figures compiled by the Federal Bureau of Investigation, firearms were responsible for sixty percent of the 18,692 murders and nonnegligent manslaughters committed nationwide in 1984. The FBI also reports that firearms were used in thirty-six percent of the 485,008 robberies committed in 1984. According to the Detroit Police Department, in the first six months of 1985, firearms were responsible for 157 homicides in Detroit alone.

Balanced against the public's right to be free from the employment of firearms for criminal use, is the limited nature of the intrusion on the defendant in this case.[6] A pursuit in the attempt to stop to ascertain whether or not a weapon is being concealed is a minuscule intrusion when weighed against the havoc cause by weapons.

Applying the balancing test first articulated in Terry, the United States Supreme Court has approved a forcible stop to investigate an informant's tip that the suspect was armed and carrying narcotics, Adams v Williams, supra, a brief stop of a moving vehicle to investigate a reasonable suspicion that its occupants were involved in criminal activity, United States v Brignoni-Ponce, supra, and a temporary detention of the occupant of a house while a search warrant for the house was being executed,

Michigan v Summers, 452 US 692; 101 S Ct 2587; 69 L Ed 2d 340 (1981). Most recently the court has approved an investigative stop based on a reasonable suspicion of past criminal activity, United States v Hensley, 469 US___; 105 S Ct 675; 83 L Ed 2d 604 (1985).

Moreover, since Terry, the Supreme Court has consistently held that the "reasonable suspicion" required for a valid investigative stop must be judged by the totality of the circumstances at the time of the incident. As the majority observes, this totality has been specifically held to include the experience and heightened perceptions of the police officers involved, United States v Cortez, supra.

It is true that flight alone cannot give rise to probable cause, since, were it otherwise, anyone who does not desire to talk to the police and who either

walks or runs away from them would always be subject to legal arrest. LaFave, Search and Seizure, Sec 3.6, p 669.

It is also true that concealment itself may be insufficient to justify a stop. Id. The majority has not, however, set forth authority justifying the conclusion that, in combination, the observation by experienced police officers of concealment and flight may not provide a reasonable suspicion that criminal activity is occurring. Indeed, the case cited by the majority, United States v Green, 216 US App DC 329; 670 F2d 1148 (1981), not only does not support the conclusion of the majority that the officers had only a generalized suspicion, it is actually a holding that the officers' observation of activity typical of a narcotics transaction, the concealment of a brown paper bag and the flight and evasion by defendant when

approached by an unmarked police car, constituted probable cause for arrest. Id. at 332.

The majority has discredited the inference which reasonable police officers might draw and has bifurcated the circumstances to conclude that the sum of the circumstances is not "greater than the sums of their parts." (Slip op p 12.)

The purported justification for their conclusion is that each circumstance may have been innocent. This analysis obscures the significance of the officers' experience and renders the totality of circumstances test meaningless. As the United States Court of Appeals for the Ninth Circuit noted in United States v Holland, 510 F2d 453, 455 (CA 9, 1975);

> "Clearly, the officers were not required to rule out all possibility of innocent behavior before initiating a brief stop...The test

> is founded suspicion...Even if it was equally probable that the vehicle or its occupants were innocent of any wrongdoing, police officers must be permitted to act before their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent."

See also United States v Viegas, 639 F2d 42 (CA 1, 1981), and United States v Black, 675 F2d 129 (CA 7, 1982).

The defendant in this case was seen by two experienced police officers[7] in a high-crime area, late at night, leaving a building in which one of the officers had previously made over fifteen arrests for concealed weapons and narcotics offenses. Upon leaving the building, the defendant was seen "stuffing a paper bag like under his vest" or "in his pants." After seeing the two officers stop their vehicle, the defendant began running down the street. At this point, the officers began pursuit.[8]

We would conclude that any "seizure" of defendant here was based on reasonable

suspicion and that the seizure of the bag was therefore justified. The bag was observed by the officer in plain view in a place where he had a lawful right to be, Harris v United States, 390 US 234; 88 S Ct 992; 19 L Ed 2d 1067 (1968).

I would reverse and remand to the trial court.

(signed) Patricia J. Boyle

G. Mennen Williams

[1] The prosecuting attorney in this case has conceded that the police officers' conduct involved Fourth Amendment activity and, as such, is governed by the standards for investigative detention set forth in Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2 889. However, we are not bound by the prosecutor's interpretation of the case and may consider and analyze the facts and issues independent of such a concession. The United States Supreme

Court in one of the companion cases to Terry, Sibron v New York, 392 US 40, 58-59; 88 S Ct 1889; 20 L Ed 2 917 (1968), disregarded the state's representation of error and decided the case on its merits, noting:

> "'[O]ur judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of the parties.' ...For us to accept his view blindly...would be a disservice to the State of New York and an abdication of our obligation to lower courts to decide cases upon proper constitutional grounds in a manner which permits them to conform their future behavior to the demands of the Constitution."

[2] Sibron v New York, supra.

[3] At least two other state jurisdictions have considered, and come to different conclusions about, whether there was a seizure in cases with facts similar to those in the instant case. Compare State v Saia, 302 So 2d 869 (LA, 1974)(seizure), with State v Sheffield, 62 NJ 441; 303 A2d 68 (1973)(no seizure).

[4] Concurring Justices Powell and

Blackmun and the Chief Justice did not reach the issue as to whether the initial stop was a seizure.

> "For me, the question whether the respondent in this case reasonably could have thought she was free to 'walk away' when asked by two Government agents for his driver's license and ticket is extremely close." Id. at 560.

5 See also United States v Barnes, 496 A2d 1040 (DC App, 1985)(no seizure where police officers approached defendant on the street, asked two questions, and requested that defendant remove his hands from his pockets).

6 The limited intrusion in this case is especially apparent when considering what is not involved here. The officers did not search the defendant's home or car, nor did they even conduct a search of the defendant. Nor was there any interrogation.

7 Although courts have sometimes been concerned in cases such as this that police may unconstitutionally stop a

citizen and then later seek to justify their actions with fabricated or unsubstantiated facts (see Landynski, The Supreme Court's search for Fourth Amendment standards: The problem of stop and frisk, 45 Conn B J 146 [1971]), in this case it is important to note that there is no indication that the events did not happen exactly as the officer related them. In fact, the trial court specifically found the testimony of Officer Surma to be highly credible.

8 A recent decision of thew United States Supreme Court, United States v Sharpe, ___US___; 105 S Ct 1568; 84 L Ed 2d 605 (1985), not only supports the observation by the majority "that flight may be a factor: (slip op p 13) in the determination of reasonable suspicion, but also offers instruction on the proper disposition of the instant case.

In Sharpe, an agent of the Drug

Enforcement Administration (DEA) notice a pickup truck with an attached camper traveling on the highway in tandem with another vehicle. After observing that the truck was riding low in the rear, that the camper did not sway or bounce when the truck drove over bumps or around curves, and that quilted material covered the rear and side windows of the camper, the DEA agent followed the vehicles for approximately twenty miles as they proceeded into South Carolina. At this time, the agent decided to make an investigative stop and contacted the state police for assistance. After the police officers signaled the lead car to stop, the pickup truck cut between the car and the patrol vehicle and continued down the highway. The state police pursued the truck and finally stopped it about on-half mile down the road. When the DEA agent arrived, he investigated

further and, finding that the truck did not sink when he stepped on the back and that there was a strange smell emanating from the camper windows, he opened the rear door and found bales of marijuana. The Sharpe Court upheld the detention and search, holding that there was no violation of the Fourth Amendment.

The majority concluded that the Court of Appeals assumption that the police had an articulable and reasonable suspicion that defendants were engaged in marijuana trafficking, given the setting and all the circumstances when the police attempted to stop the vehicles, was abundantly supported by the record. The factors were noted as follows: the agents observed the vehicles in an area known to be frequented by drug traffickers; the pickup truck was a type used to transport marijuana; the truck appeared to be heavily loaded and its windows were covered with bed sheet material, the

vehicles took evasive actions and started speeding when the officer began to follow them in his marked car. The court noted: "Perhaps none of these facts, standing alone, would give rise to a reasonable suspicion; but taken together as appraised by an experienced law enforcement officer, they provided clear justification to stop the vehicles and pursue a limited investigation." Id., 105 S Ct 1573-1574.

Justice Marshall's concurrence and Justice Brennan's dissent also shed light on the correct resolution of this case. Justice Marshall concurred because "the evasive actions of the defendants here turned what otherwise would have been a permissibly brief Terry stop into the prolonged encounter now at issue." Id., 105 S Ct 1577.

Justice Brennan, dissenting because the Court was making a de facto factual determination of evasiveness, also

engaged in discussion instructive for our present purposes:

> "I had thought it rather well established that where police officers reasonable suspect that an individual may be engaged in criminal activity, and the individual deliberately takes flight when the officers attempt to stop and question him, the officers generally no longer have mere reasonable suspicion, but probable cause to arrest. See, e.g., Peters v New York, decided together with Sibron v New York, 392 US 40, 66-67, companion case to Terry ('deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest')."

While this case does not involve a question whether knowledge of the officer was sufficiently specific to constitute probable cause when combined with flight, as the most recent discussion of the Court, Sharpe is notable as suggesting that there is no basis in the opinions of the United States Supreme Court for the decision reached today.